

No 70.

neral principle, that the law of the country, where the action is brought, must be the rule of judging, is particularly applicable to the plea of prescription; *Voet. Lib. 1. tit. 8. § 30.* and *Lib. 44. tit. 3. § 12.* and has been so determined by this Court, as appears from various decisions, *voce* FOREIGN.

The defenders have no occasion to dispute that the *lex loci contractus* regulates the constitution of the contract; and, of course, a bond executed in England, agreeable to the English form, will be a good ground of action in this country; and a proof of payment made in England will be allowed by witnesses; but which would not be the case, even of an English bond, if payment was made in Scotland; because such proof is not admitted by the law of this country. When an action is brought in this country, prescription is an exception, which being competent by the law of this country, must be received; for, in such cases, it is not the *lex loci contractus*, but the *lex loci*, which is the law of the place where the action is brought, that must be the rule; *Huber de conflictu legum diversarum in diversis imperiis.* And, as the pursuer has brought his action in this country, and the prescription known in the law of this country is pleaded in bar of that action, that plea must be sustained or repelled by the rules of the law of Scotland.

‘THE LORDS having advised the report made by the Lord Auchinleck, upon the 27th January last, with the memorials *hinc inde* given in, in obedience to the last interlocutor, they sustain the defence of the triennial prescription, assoilzie the defenders, and decern.’

For Randal, *Alex. Wight.*

For Defenders, *Cosmo Gordon.*

A. E.

Fol. Dic. v. 3. p. 220. Fac. Col. No 70. p. 310.

1771. February 20.

MRS JEAN KERR *against* ALEXANDER EARL of HOME.

No 71.

Triennial prescription applies to debts contracted in England.

THE pursuer let her house in London to the deceased William Earl of Home, the defender's brother, who possessed it from Midsummer 1752 to Lady-day 1756.

Earl William went abroad and died in the year 1761, being then due Mrs Kerr a considerable sum of money as arrears of rent. The pursuer in 1767, having brought an action in the Court of Session against Alexander Earl of Home, as representing his brother, for payment of the balance of rents due, his Lordship stated in defence, that the claim was cut off by the triennial prescription of the statute 1579, c. 83.

The cause being reported to the Court upon informations, the pursuer *pleaded,*

It was a rule and principle of law, both with regard to the constitution and subsistence of obligations, that the law of that country only where they were executed should be regarded, however different it might be from the practice

or law of the country where such questions came to be determined, M'Morland *contra* Melvill, No 14. p. 4447.

From thence it followed, that every question relative to the endurance of obligations must depend upon the *lex loci contractus*; and that unless the law of that country had imposed a limitation which would bar an action in their own courts, the person who was sued in another country, to which he had retired, ought not to be allowed to take the benefit of any prescription which prevailed there. If the obligation was still in force in the country where it was entered into, it would be unjust to allow the debtor to get free by stepping into another country where such obligations were limited to a shorter endurance. Mackenzie's Observations on statute 1579. c. 83.

This doctrine was strictly applicable to the present question; no relevant defence could have been stated against the debt in England; so that if the triennial prescription was admitted, it would be allowing the debtor to get free of a debt justly due by the law of the country where it had been contracted. The decision Randal *contra* Innes, No 70. p. 4520, which the defender chiefly relied on, went upon a specialty which did not in the present instance occur. Captain Innes the debtor had resided in Scotland entirely for many years, for a period preceding his death much longer than was sufficient to found the defence of the triennial prescription; and hence he could only be pursued before a Scottish court, and according to the law of Scotland.

The defender *pleaded*, Whatever regard may be paid here, *ex comitate*, to the laws of a foreign country, with respect to the formality of contracts executed there, it could not be maintained that these laws could regulate the time and manner of execution upon such debts when sued for in this country. It was clearly laid down by the legal authorities, that the law of the place in which execution was demanded for recovery of a debt, must be the rule for regulating every thing concerning that execution. Sande. Decis. Fris. lib. 1. tit. 12.

It was equally certain that this rule applied to the plea of prescription. Every action brought for a foreign debt here was an immediate step towards execution; and of course, every plea proposed in bar of such action, had a fixed relation to the execution which would otherwise have followed. *Huber de conflictu legum divers. in divers. imperiis. Voet ad digest. lib. 44. tit. 3. § 12. Principles of Equity, b. 3. c. 8. Sect. 6. B. 1. part 1. c. 5. Sect. 3.*

The ancient decisions of the Court upon this point had not indeed been uniform; but as the law had gradually advanced to maturity, the question had been more thoroughly canvassed, and that *comitas*, which had sometimes been carried too far, reduced to proper bounds. Assignees of Thomson and Tabor, Div. 9. Sec. 4. *b. t.*; Thomson and Hay *contra* the Earl of Linlithgow, No 58. p. 4504; where the precise question as to the Scots triennial prescription was expressly decided.

No 71.

This point ought to be considered as at rest. In a late case, Randal *contra* Innes, No 70. p. 4520, it had been found that the triennial prescription applied to debts contracted in England. This decision had been given upon the abstract point; and as to the alleged specialty, if it really in that case had any influence, it must be equally effectual here, as both the late and present Earls of Home, by being Scotsmen, and having estates in Scotland, were at all times amenable to the courts of this country.

It was *observed* upon the Bench, that when a creditor comes to sue in any country, he must be able to state that, according to the law of that country the debt is subsisting; which the pursuer in this case could not do.

THE LORDS, February 20. 1771, sustained the defence; but in doing so were a good deal moved by the defender's having a house in Scotland, which fixed a domicile, and rendered him amenable to the courts of this country.

Lord Ordinary, *Justice-Clerk*.
Clerk, *Ross*.

For Mrs Kerr, *Macqueen*.
For Earl of Home, *Rae*.

R: H.

Fac. Col. No 80. p. 234.

1772. February 4.

BRYAN BARRET of London, Laceman, *against* ALEXANDER EARL OF HOME.

No 72.
Found as
above.

BARRET sued the Earl of Home, as representing his brother, the late Earl, *inter alia*, for furnishings made to him between the years 1752 and 1759, conform to an account produced, amounting to L. 114; 4; 1 Sterling; during the currency of which account, the deceased Earl had resided in London, and the different articles were there delivered to him.

The defender *pleaded*, That this debt was cut off by the triennial prescription; and cited the decisions in the case of Randal against Innes, No 70. p. 4520, and in the question between himself and Mrs Jean Kerr, on this very point, No 71. p. 4522.

THE LORDS sustained the defence of prescription pleaded against the account libelled, and assoilzied the defender from the conclusions of the libel as to said account.

Act. *W. M'Kensie*.Alt. *Rae*.Clerk *Ross*.*Fol. Dic. v. 3. p. 220. Fac. Col. No 3. p. 4.*